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February 2, 1998

BY HAND

Ms. Magalie Salas
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Comments of Ameritech New Media, Inc. in CS Docket No. 97-248 and RM No. 9097

Dear Ms Salas:

Enclosed for filing please find the original and nine (9) copies of the Comments of Ameritech New Media, Inc. in the above-referenced dockets.

Please direct any questions that you may have to the undersigned.

Respectfully submitted,

Lawrence Sidman

Lawrence R. Sidman

Enclosures

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	CS Docket No. 97-248
	)	RM No. 9097
Petition for Rulemaking of Ameritech New Media, Inc Regarding Development of Competition and Diversity in Video Programming Distribution Carriage	)	

COMMENTS OF AMERITECH NEW MEDIA, INC.

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COMMENTS OF
AMERITECH NEW MEDIA, INC.

Ameritech New Media, Inc. ("Ameritech"), by its attorneys and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, hereby submits these comments in response to the above-captioned Memorandum Opinion and Order and Notice of Proposed Rulemaking ("NPRM") to amend the Commission's program access rules, 47 C.F.R. § § 76.1000 *et seq.* Ameritech requests that Ameritech's May 16, 1997 Petition for Rulemaking, together with the comments, oppositions and reply comments filed in response thereto, be made part of the record of this proceeding.

I. INTRODUCTION AND SUMMARY

This rulemaking proceeding affords the Commission an important opportunity to make a real and substantial contribution to the cause of increased and more vigorous competition in the multichannel video programming distribution ("MVPD") marketplace. The Commission's recently released Fourth Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming[1/] ("Fourth Annual Report") is eloquent testament to the Commission's need to strengthen its program access rules. Notwithstanding some positive developments, the inescapable conclusion to be drawn from the Fourth Annual Report is that competition in the MVPD marketplace is developing slowly and rather anemically. "The cable industry continues to occupy the dominant position in the MVPD marketplace . . . . The cable industry's large share of the MVPD audience . . . reflects an inability of consumers to switch to some comparable source of video programming."[2/]

The Fourth Annual Report corroborates the concerns of many Members of Congress expressed over the last year: American viewers are not receiving the tangible dividends of competition: lower prices and more choices.[3/] Consumers are contending with skyrocketing

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1/ CS Docket No. 97-141, FCC 97-423 (January 13, 1998).

2/ *Fourth Annual Report* at ¶¶ 7, 8.

3/ *Status on Competition in the Video Marketplace: Hearing Before the Senate Committee on Commerce, Science and Transportation,* 105th Cong., 1st Sess. (April 10, 1997); *Video Competition: the Status of Competition Among Video Delivery Systems: Hearing Before the Subcommittee on Telecommunications, Trade and Consumer Protection of the House Committee on Commerce,* 105th Cong., 1st Sess. (July 29, 1997); *State of Competition in the Cable Television Industry: Hearing Before the House Committee on the Judiciary,* 105th Cong., 1st Sess. (Sept. 24, 1997); *Antitrust and Competition Issues in the Cable and Video Market: Hearings Before the Subcommittee on Antitrust, Business Rights and Competition of the Senate*

(continued...)

prices charged by incumbent cable operators, dwarfing the rate of inflation: "[C]able operators on average increased their rates 8.5 % for regulated programming and equipment over the 12-month period from July 1996 to July 1997." [4/] The growth experienced in direct broadcast satellite ("DBS") service obviously is not constraining cable prices.

In short, the Fourth Annual Report makes abundantly clear that more must be done to spur competition in the MVPD market. Access to programming is as central to the development of competition today as it was in 1992 when Section 628 of the Communications Act, 47 U.S.C. § 548, became law. That provision of the 1992 Cable Act facilitated the emergence of competition to incumbent cable operators from new technologies such as DBS. It did so by recognizing that the key to competition in the MVPD marketplace was assembling attractive programming packages for consumers, something that aspiring competitors could not do without access to programming at nondiscriminatory prices, terms and conditions. Today, we stand at the threshold of a new phase in the development of competition to incumbent cable, ready to move from the mere existence of competition to the realization of meaningful competition. If that transition is to occur, it is critical to revisit and strengthen the Commission's access to programming rules to provide a far more potent antidote to anticompetitive conduct of incumbent

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[3/](...continued)
Committee on the Judiciary, 105th Cong., 1st Sess. (October 8, 1997); *Video Competition: Access to Programming: Hearing Before the Subcommittee on Telecommunications, Trade and Consumer Protection of the House Committee on Commerce,* 105th Cong., 1st Sess. (October 30, 1997).

[4/] *Fourth Annual Report* at ¶ 7; *see also,* In the Matter of *Implementation of Section 3 of the Cable Television Consumer Protection Act of 1992 (Statistical Report on Average Rates for Basis Service, Cable Programming Services, and Equipment)* in FCC 97-409, (rel. Dec. 15, 1997) (*Report on Cable Industry Prices* in MM Docket No. 92-266 at ¶ 4) [hereinafter "*Report on Cable Industry Prices*"].

cable operators and vertically integrated programming vendors. The prospects of meaningful competition becoming a reality will brighten significantly if violations of the program access rules are swiftly adjudicated and the economic consequences of such violations are certain and sufficiently severe that they will operate as a forceful marketplace disincentive to anticompetitive behavior.

Accordingly, the Commission should use this NPRM as a market opening mechanism by adopting three discrete program access rule changes.[5/] First, the Commission should provide for deadlines within which it must render decisions on program access complaints under Section 628, specifically, ninety (90) days for complaints not involving discovery and one hundred fifty (150) days for complaints involving discovery. Second, the Commission should ensure that complainants and the Commission itself have access to documents critical to determining whether Section 628 is being violated. This objective can be achieved by requiring that such documents, notably including programming contracts, be appended to answers. Additionally, where a party requests that the Commission permit discovery, including the taking of depositions, there should be a presumption in favor of the Commission granting that discovery request. Third, the Commission should provide for the imposition of substantial economic penalties, in the form of both forfeitures and liability for damages, to discourage violations of Section 628 by cable

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[5/] The text of the proposed amendments to 47 C.F.R. § 76.1003 is attached hereto as Appendix 1. Ameritech has refined its arguments originally contained in its Petition for Rulemaking in an effort to promote the harmonization of the Commission's program access rules, as much as possible, with the Commission's newly adopted and streamlined rules governing the procedures to be followed when formal complaints are filed against common carriers. *See* In the Matter of *Implementation of the Telecommunications Act of 1996 (Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers), Report and Order* in CC Docket No. 96-238, FCC 97-396, (rel. Nov. 25, 1997) [hereinafter *Common Carrier Report and Order*].

operators and programmers. Consistent with the Commission's Forfeiture Policy Statement,[6] forfeitures in the amount of $7,500 dollars per day per program access violation retroactive to the date of violation should be assessed. In addition, aggrieved parties should be permitted to seek damages, including consequential damages, for the injury they have suffered as a result of denial of programing on nondiscriminatory prices, terms and conditions. These targeted changes provide the necessary muscle, noticeably absent from the current program access rules, to have a substantial and positive impact on the development of competition in the MVPD market.

II. ALTHOUGH AMERITECH IS MAKING PROGRESS AS A COMPETITIVE PROVIDER OF CABLE SERVICES, ITS FUTURE GROWTH COULD BE CONSTRAINED BY DIFFICULTIES IN OBTAINING PROGRAMMING ON NONDISCRIMINATORY PRICES, TERMS AND CONDITIONS

Ameritech has been doing its part to bring the type of robust head-to-head competition to incumbent cable that Congress, the Commission and the public so very much desire. In response to Congress' repeal of the telephone company - cable cross-ownership prohibition contained in Section 302 (b) (1) of the Telecommunications Act of 1996, Ameritech has been engaged in building out state of the art cable systems and providing video programming services subject to Title VI of the Communications Act. Ameritech now has franchises in 65 communities having a total population of more than 2.5 million people living in approximately 1.1 million homes.

From a public interest perspective, Ameritech's competitive entry into the MVPD marketplace is providing the benefits consumers deserve and Congress expected when it enacted Section 651 of the Communications Act. For example, in Columbus, Ohio, the monthly rate

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[6] In the Matter of *the Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, CI Docket No. 95-6, FCC 97-218 (rel. July 28, 1997).

charged by the incumbent cable provider for expanded basic service dropped from $29.61 to $26.40, a price decrease of approximately eleven percent, after Ameritech entered the market. Similarly, prior to Ameritech's entry into the Canton, Michigan market, a customer of the incumbent operator, Media One, who, for example, subscribed to the expanded basic tier, the Disney Channel and a regional sports network paid $53.12 per month. Upon Ameritech's entry into the market, that same customer receiving an expanded service offering saw her rate lowered to $32.64, saving over $20 per month. In the nearby community of Ann Arbor, where Ameritech does not compete, Media One offers the same services for $36.44, about 11.5% more per month. In community after community, Ameritech's entry into the MVPD market has triggered special offers by the incumbent cable provider, including discounts in promotional packages, free premium and pay-per-view channels, network upgrades and new channels, and upgraded converter boxes with interactive programming guides (IPG).[7/] In short, competition from Ameritech has translated directly and instantaneously into benefits for consumers.

Notwithstanding this measure of success achieved by Ameritech, the environment in the MVPD market remains hostile to competition. Ameritech has experienced and continues to experience difficulties in obtaining access to certain quality cable programming on nondiscriminatory prices, terms and conditions, adversely affecting its ability to assemble attractive programming packages to offer to consumers at the most competitive prices. For example, Ameritech experienced discriminatory pricing and conditions for regional sports

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[7/] An analysis of the procompetitive effects of Ameritech's entry into the MVPD market in eight communities is attached hereto as Appendix 2. These examples establish that the kind of direct, head-to-head competition provided by Ameritech is driving down prices offered by incumbent cable operators, just as Congress hoped would occur.

programming for Chicago, Illinois and Cleveland, Ohio area markets as a result of anticompetitive behavior adjudged by the Commission to have violated Section 628.[8/] Consequently, in those markets Ameritech's ability to offer the most competitively attractive programming package to new subscribers was compromised. Similarly, where Ameritech was unable to obtain access to the HBO network because of a grandfathered exclusive contract,[9/] it garnered substantially fewer new subscribers than in markets where it had access to HBO.

Ameritech continues to be concerned about its inability to gain access to fX, a cable network controlled by NewsCorp and Liberty Media, particularly in light of the apparent migration of popular syndicated programing, such as the "X Files" and "Beverly Hills 90210," to that cable programming network. Ameritech's inability to obtain increasingly important non-vertically integrated programming such as MSNBC, although not covered by Section 628, nevertheless is adversely affecting Ameritech's program offerings and, as a direct result, its competitive posture. This concern is heightened by the frantic pace of consolidation in the video market, [10/] especially in the area of sports programming, considered indispensable to a video provider's success, and without which, an alternative video provider cannot create programming packages attractive enough to be considered a "real choice" to viewers.[11/] All of these examples illustrate the fundamental fact that attractive programming packages are absolutely essential to

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[8/] *See Corporate Media Partners d/b/a Americast and Ameritech New Media, Inc. v. Rainbow Programming Holdings, Inc.*, CSR-4873-P, DA 97-2040 (rel. Sept. 23, 1997).

[9/] *See Corporate Media Partners d/b/a Americast and Ameritech New Media, Inc. v. Continental Cablevision, Inc. and Home Box Office,* 11 FCC Rcd 7735 (1996).

[10/] *See Fourth Annual Report* at ¶ ¶ 166, 167.

[11/] *See Fourth Annual Report* at ¶ 166.

audiences. Without such programming, alternative providers cannot penetrate the video market and competition to incumbent cable withers and dies. Effective access to programming is the essential safeguard for competition in the MVPD market.

III. THE IMPOSITION OF STRICT TIME LIMITS FOR RENDERING DECISIONS ON SECTION 628 COMPLAINTS IS ESSENTIAL TO THE EFFECTIVENESS OF THE PROGRAM ACCESS RULES AND IS PROCOMPETITIVE

Section 628 requires the expeditious resolution of program access complaints.[12/] The Commission's current rules provide no deadlines for issuance of decisions on program access complaints. Consequently, as the Commission's discussion in the NPRM reflects,[13/] it is somewhat difficult even to ascertain an average processing time for these complaints. What is clear, however, is that the absence of firm deadlines is undermining the effectiveness of Section 628 as an instrument of competition.[14/] There is a profound prejudice to both complainants and the development of competition in the MVPD market resulting from the lack of deadlines within which the Commission is to resolve program access complaints. Each day a meritorious complaint goes unresolved, for whatever reason, is another day in which an aspiring competitor is denied meaningful access to programing -- either by a refusal to deal or by providing access on discriminatory prices, terms and conditions. From the injured aspiring competitor's perspective, this is the classic example of "justice delayed is justice denied." The wrongful denial of

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12/ "The Commission's regulations shall - (1) provide for an expedited review of any complaint pursuant to [Section 628]." 1992 Cable Act § 628 (f)(1); 47 U.S.C. § 548 (f)(1).

13/ NPRM at ¶ 37.

14/ Ameritech's own experience with program access complaint proceedings wherein it took the Commission nine months to resolve a relatively simple program access case is illustrative of the problem. *See Corporate Media Partners d/b/a Americast and Ameritech New Media, Inc. v. Rainbow Programming Holdings, Inc.*, CSR-4873-P (rel. Sept. 23, 1997).

programming or its acquisition on egregiously discriminatory prices, terms or conditions could delay the introduction of service in new markets, cause loss of potential market share and even cause an aspiring new entrant to lose a window of opportunity for entering the MVPD market. Such harm to competition hurts the consumer who, once again, is deprived of the benefits of competition.

These needless anticompetitive risks and harms can be eliminated by imposing reasonable time frames within which decisions on Section 628 complaints must be rendered. Ameritech respectfully submits that a Commission decision in Section 628 proceedings should be required within ninety (90) days from the filing of the complaint in cases where there is no discovery and within one hundred fifty (150) days from filing of a complaint in cases where there is discovery.[15/]

These deadlines are completely consistent with the various statutory deadlines, all ranging from 90 to 150 days, for resolution of different types of common carrier complaints, imposed by the Congress in the Telecommunications Act of 1996.[16/] In its recent Common Carrier *Report and Order*, implementing these statutory deadlines, the Commission concluded that: "Prompt and effective enforcement of the Act and the Commission's rules is crucial to attaining the 1996 Act's goals of full and fair competition in all telecommunications markets."[17/] Moreover, the Commission determined to apply these procedures conducive to expeditious dispute resolution to

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15/ These time frames complement the additional proposed improvement to the Commission's rules of requiring fact-based pleadings.

16/ *See* 47 U.S.C. § § 208 (b)(1), 260 (b), 271 (d)(6)(B) and 275 (c).

17/ *Common Carrier Report and Order* at ¶ 1.

nearly all formal complaints filed against common carriers,[18] again embracing a procompetitive rationale for its action: "A uniform approach will ensure that the Commission places on all formal complaints the same procompetitive emphasis underlying the 1996 Act's complaint resolution deadline."[19]

The very same judgment that Congress made regarding the Commission's ability to resolve common carrier complaints within 90 to 150 days and the very same procompetitive justification relied upon by the Commission to extend the principle of swift, streamlined adjudication to nearly all common carrier complaints apply with equal if not greater force to resolution of program access complaints under Section 628. In many instances, such as refusals to deal, program access complaints can be expected to be easier to resolve than some types of common carrier complaints because they are neither factually nor legally complex. More demanding program access cases involving, for example, price or other more subtle forms of discrimination, where discovery is required, still could be decided easily within the expanded 150 day time frame proposed by Ameritech. As in the common carrier context, these proposed deadlines for Commission decision in Section 628 cases can be met without unduly straining Commission resources by requiring more complete information from the parties in their pleadings and requiring the parties to narrow and refine both the factual and legal issues in dispute to the maximum extent feasible prior to Commission decision.

The Commission should amend its program access rules to provide for a defendant to file its answer to a complaint within twenty (20) days after receipt of service of the complaint. This

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[18] *Common Carrier Report and Order* at ¶ 29.

[19] *Id.* at ¶ 3.

reduction in time in which to file an answer is also consistent with the procedural changes in the common carrier context [20/] where the time for filing an answer was reduced from thirty (30) to twenty (20) days. In the common carrier context, mandatory pre-complaint discussions between the parties serve to clarify and narrow the issues to permit contraction of the time in which to file an answer to twenty (20) days.[21/] Similarly, the required ten day notice preceding the filing of a program access complaint,[22/] and the discussions between the parties which inevitably ensue, also permit narrowing of the issues, making 20 days from service of the complaint sufficient for filing an answer. As a practical matter, reduction of the time for filing an answer will facilitate the Commission rendering a decision within the deadlines urged by Ameritech without imposing an undue burden on defendants.[23/]

Within five (5) days of the service of the answer, the parties shall advise each other and the Commission of whether they intend to request discovery. If neither party seeks discovery, the complainant shall be permitted to file a reply within twenty days after service of the answer, as currently provided in 47 C.F.R. § 76.1003(e). The record then will be closed, providing the Commission as much as fifty days thereafter to issue a decision and still comply with the proposed ninety (90) day deadline.

[20/] *See Common Carrier Report and Order* at ¶ 100.

[21/] *Id.* at ¶ 41.

[22/] 47 C.F.R. § 76.1003(a).

[23/] *See Common Carrier Report and Order* at ¶ 100.

If, however, either party requests discovery, then the FCC shall convene a status conference within ten (10) days of the service of the answer.[24] Amongst other things, the nature, scope and amount of discovery should be determined at this status conference. Completion of all discovery would be required within forty-five (45) days following the status conference. If discovery is permitted, within fifteen (15) days following completion of discovery, both complainant and defendant would be required to submit briefs containing proposed findings of fact and conclusions of law,[25] and, if possible, a joint stipulation of facts not in dispute. At the same time, they would be required to file any evidentiary exhibits. The parties would be permitted to file reply briefs within seven (7) days of the service of the briefs containing proposed findings of fact and conclusions of law.[26] At that juncture, the record would be deemed closed, again giving the Commission more than fifty (50) additional days to render its decision and still meet the proposed one hundred fifty (150) day deadline.[27]

The NPRM raised the question of the tension between a deadline for decision and discovery which is time consuming.[28] This tension is resolved by Ameritech's proposal for allowing sixty (60) more days for decisions in program access complaint proceedings involving discovery. Tying the 90 or 150 day deadline to whether or not there is discovery is eminently

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[24] *Id.* at ¶ 121.

[25] *See Common Carrier Report and Order* at ¶¶ 267 and 270.

[26] *See Common Carrier Report and Order at ¶ 271.*

[27] A chart summarizing the procedures and time frames proposed by Ameritech for both the 90 day and 150 day proceedings is attached hereto as Appendix 3.

[28] NPRM at ¶ 39.

sensible and practicable. Absent discovery, the record before the Commission is likely to be significantly smaller and probably less complex. Moreover, the time consumed for the conduct of discovery is eliminated from the decision making cycle.

The NPRM also sought comment on whether different time limits should apply to different types of program access complaints.[29/] Ameritech believes it would be unwise for the Commission to adopt a rigid deadline for decisions based on the type of complaint involved. It is essential to preserve the flexibility to accommodate the need for discovery in any complaint brought under Section 628. Although it is quite likely that most refusal to deal cases and simple price discrimination cases should not require discovery, and therefore should be resolved in 90 days, it is imprudent to determine in the abstract that discovery would never be needed in such cases. Obviously, the more complex a price discrimination case becomes, the greater the likelihood that discovery will be essential to its resolution, in turn necessitating a longer time for Commission decision.

IV. A COMBINATION OF REQUIRED DOCUMENT PRODUCTION TO ACCOMPANY ANSWERS AND DISCOVERY WITHIN THE COMMISSION'S DISCRETION WILL STREAMLINE THE PROGRAM ACCESS COMPLAINT RESOLUTION PROCESS

In the NPRM, the Commission evidenced its disinclination to provide for discovery as a matter of right[30/] in program access proceedings. Ameritech believes that the Common Carrier Report and Order provides useful guidance to resolve the dilemma of providing access to crucial information exclusively in the possession of the defendant without requiring discovery as a matter

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[29/] *Id.* at ¶ 39.

[30/] NPRM at ¶ 44.

of right. The Common Carrier Report and Order emphasizes fact-based pleadings,[31] requiring parties to provide supporting documentation upon which they intend to rely, including but not limited to tariffs.[32] In program access complaints under Section 628, the required production of certain key documents to accompany the answer similarly would give the complainant access to critical information, usually yielded by discovery, in a streamlined fashion and very early in the process. This access to documents is particularly important in program access cases because virtually all of the facts are within the exclusive possession of the defendant cable operator or programming vendor. For example, in discrimination cases involving unfair differences in prices, terms or conditions, the existence and magnitude of such differences and the justification, if any, for them, all reside within the exclusive control of the programmer. By accelerating production of these documents, *i.e.*, filing them with the answer, the issues will be narrowed earlier, and it will be easier for the Commission to decide cases within the deadlines Ameritech advocates in these Comments.

The proposed required document production accompanying the answer also has a direct impact on the need for and extent of discovery. Under the Commission's current rules, in cases where discovery is allowed by the Commission, interrogatories often are used to compel a defendants's identification and production of key documents. By requiring production of such documents with the answer, this aspect of discovery is eliminated, streamlining and expediting the decision making process. Production of these key documents will allow both parties to "cut to

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[31] *Common Carrier Report and Order* at ¶ 81.

[32] *Id.* at 87.

the chase" early in the adjudicative process. It, in turn, enables any discovery requests to be far more focused and meaningful.

Specifically, the Commission should amend its rules to provide that the following documents be appended to the answer. In all program access complaints, the defendant would be required to produce and append to its answer all documents upon which it intends to rely to establish its defense. In addition, the defendant would be required to produce with its answer certain key documents necessarily implicated by the allegations in the complaint. For example, in refusal to deal cases, if the complaint alleged an unlawful exclusive agreement, the defendant would be required to produce the exclusive contract or to answer specifically that no such contract exists. In price discrimination cases, the defendant would be required to produce: all contracts between the defendant vertically integrated programmer and all competing MVPDs in all Designated Market Areas ("DMAs") the complainant serves or reasonably expects to serve; all other documents, such as side letters, affecting the prices, terms and conditions of such service; and all relevant rate cards. In short, this change makes mandatory the production of key documents with the answer, a process which is only discretionary with the defendant under the current program access complaint procedures.[33/] Failure of a defendant to file these required documents with its answer would result in a Commission finding that the defendant has not met its burden of proof with regard to rebutting specific allegations to which such documents are pertinent.

Even though Ameritech proposes that key documents be required to be produced with the answer, discovery may still be necessary to explain documents or fill in evidentiary gaps,

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[33/] *See* 47 C.F.R. § 76.1003 (d)(5) and (6).

particularly in complex cases. The rationale for discovery in program access cases is particularly compelling because virtually all of the key facts lie within the exclusive control of the defendant. In price discrimination cases, the plethora of facts underlying the affirmative defenses which a defendant may assert makes the availability of discovery, especially depositions, particularly important. Discovery is a matter of right under the Federal Rules of Civil Procedure,[34/] and should be available here where needed.

Accordingly, if a party requests discovery, there should be a presumption in favor of its grant by the Commission.[35/] Either written interrogatories or depositions would be permitted where discovery is requested by the parties and ordered by the Commission staff at the status conference. Consistent with this approach, the Commission should not require that the complainant's written interrogatories be attached to the complaint. Such a requirement would be counterproductive because at the time the program access complaint is filed, the complainant does not know enough about the circumstances to ask the most meaningful questions designed to elicit useful information. Therefore, it would be more useful for the Commission to permit the complainant to propound any written interrogatories after the status conference.

The production of documents either with the answer or as part of discovery should be done pursuant to protective order, where necessary and appropriate to protect confidential, proprietary and competitively sensitive business information.[36/] Ameritech endorses the standard

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[34/] Fed. R. Civ. P. 26(b).

[35/] If the Commission were to reject mandatory document production with the answer, discovery as of right would be essential.

[36/] *See* 47 C.F.R. § 76.1003 (h).

protective order and related procedures attached by the Commission to its NPRM, with one necessary modification. Specifically, Ameritech urges the Commission to permit an individual who may be involved with programming decisions and negotiations to have access to materials covered by the protective order where such person's involvement is essential to the analysis of the defense. Obviously, such a programming expert, like anybody else subject to the protective order, would be required to certify that he/she will use it only for its intended purpose -- to resolve the program access complaint. This expansion of the class entitled to view materials under the protective order is essential to accommodate the realities of staffing among new entrants into the MVPD market. Often aspiring competitors to incumbent cable have a small but efficient staff, with employees serving the company in multiple capacities. The problem arises when the company's technical and programming expert, unquestionably needed to view the contracts and properly analyze the facts in a program access dispute, is also engaged in acquiring programming for the company. Under the Commission's proposed protective order rules, that individual would be prohibited from viewing the information involved in the dispute because of his/her ability to use competitively the information gained from viewing the documents involved in the program access dispute. The net result of such a restriction would be that the aspiring competitor would be severely handicapped if not foreclosed from the opportunity to prove the violation. That result would benefit the violator of the program access rules by limiting the ability of the smaller competitor to prove a program access violation.

Congress intended that Section 628 serve as a cost-effective supplement to the antitrust laws because "companies...might be denied relief in light of the prohibitive costs of pursuing an

antitrust suit."[37] Aspiring competitors to incumbent cable operators should not be denied the opportunity to successfully prove their harm simply because they have employees handling a variety of issues. Nor should incumbent cable operators go unpunished simply because they are fortuitous enough to be a defendant in a Section 628 proceeding involving a small aspiring competitor and not a larger alternative service provider with a large programming staff.

V. A PENALTY-WITH-A-REMEDY APPROACH -- INCLUDING LIABILITY FOR FORFEITURES AND DAMAGES -- IS NECESSARY BOTH TO DETER ANTI-COMPETITIVE CONDUCT AND TO COMPENSATE INJURED PARTIES

Section 628(e)(2) of the Communications Act, as amended, clearly provides the Commission with authority to impose forfeitures on violators of the program access rules.[38] That provision states that: "The remedies provided in paragraph (1) [authorizing the Commission to reform contracts to eliminate discriminatory prices, terms and conditions] are in addition to and not in lieu of the remedies available under Title V or any other provision of this Act."[39] Title V, of course, deals with forfeitures.

In addition, the Commission has previously determined correctly that Section 628(e)(1) provides plenary authority to adopt "appropriate" remedies for violations of the program access rules including damages.[40] Since the program access provisions are antitrust provisions in their

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[37] S. Rep. No. 92-102, 102nd Cong., 1st Sess. 29 (1991).

[38] 47 U.S.C. § 548 (e)(2).

[39] *Id.* [Emphasis added].

[40] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 (Development of Competition and Diversity in Video Programming Distribution and Carriage)*, 10 FCC Rcd 1902, 1910-1911 (1994) (*Memorandum Opinion and Order on*

(continued...)

purpose, effect and approach, it is beyond peradventure that damages remedies to redress the anticompetitive injury suffered by the aggrieved party would be "appropriate" remedies.[41] The breadth of Section 628(e), combined with the Commission's broad general enforcement powers contained in 47 U.S.C. § § 4(i) and 303(r), clearly permits the award of damages.[42]

To date, however, the Commission, as a matter of policy, has declined to exercise its power to levy forfeitures or permit complaints for damages because it did not believe such action was necessary.[43] The time has come for the Commission to change course. It is clear that "[t]he current processes are not working,...."[44] and the cycle of anticompetitive behavior must be broken.

A "penalty-with-a-remedy" approach, where forfeitures provide for certain basic penalties for violation of the Commission's rules and damages provide remedies to injured aspiring competitors, would have the combined effect of creating the much-needed economic disincentives for violations of the program access rules. Such an approach, along with the adoption of sound procedural deadlines for prompt prosecution and resolution of program access complaints, would prevent violators from profiting through reliance on slow moving Commission processes and a

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[40](...continued)
Reconsideration of the First Report and Order), [hereinafter *First Reconsideration Order*]

[41] Compare Section 628's provisions with the Sherman Act, 15 U.S.C. § 1, and refusal to deal cases decided thereunder, and the Robinson-Patman Act Amendments to the Clayton Act, 15 U.S.C. § § 13 *et seq.*

[42] *See e.g., New England Tel. & Tel. Co. v. FCC*, 826 F.2d 1101 (D.C. cir. 1987), cert. denied, 490 U.S. 1039 (1989); *see North American Tel. Ass'n v. FCC*, 772 F.2d 1282, 1293 (7th Cir. 1985) (reference to Commission's "broad powers under § 4(i)").

[43] *First Reconsideration Order*, 10 FCC Rcd at 1911.

[44] *Id.*

general lack of certainty about economic penalties for violations. Each day a program access violation remains unresolved is another day the program access rule violator is able to dominate the market and exclude competitors. Clearly, violators would be forced to "think twice" about violating the program access rules if confronted with relatively fast-paced adjudications and exposure to both forfeitures and damages.

In the NPRM, the Commission specifically notes that its forfeiture guidelines establish a $7,500 per day baseline penalty for program access violations and seeks comment on this amount.[45/] Ameritech supports adoption of rules imposing forfeitures in the amount of $7,500 per violation, per day, to be assessed from the first date of the violation. In the case of a refusal to deal, the forfeitures would commence on the date of the defendant's initial refusal to deal in response to a written request to obtain programming. In price discrimination cases, the violation would commence as of the date of the contract between complainant and defendant which contained unlawfully discriminatory prices, terms or conditions. This baseline forfeiture amount is necessary for the Commission to carry out its expanded forfeiture authority faithfully.[46/]

In the Omnibus Balanced Budget Act of 1989, the Commission's forfeiture authority was strengthened for the intended effect of serving "as both as a meaningful sanction to the wrongdoers and a deterrent to others."[47/] Inclusion of the specific amount of the forfeiture in the

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45/ NPRM at ¶ 47 and n.131.

46/ In the Matter of *The Commission's Forfeiture Policy Statement and Amendment of Section 1.8 of the Rules to Incorporate the Forfeiture Guidelines,* 8 P & F 1314, 1320 (*Forfeiture Policy Statement* in CI Docket No. 95-6) (rel. July 28, 1997).

47/ *Omnibus Budget Reconciliation Act of 1989*, H.R. Conf. Rep. 386, 101st Cong., 1st Sess., 434 (1989).

program access rules provides predictability in the process and is an appropriate means of putting potential violators on notice of the seriousness of such offenses and the certainty of the penalty if a violation is found. The amount of the forfeiture is commensurate with the serious and continuing harm to the public resulting from lack of robust competition in the MVPD marketplace deriving from program access violations. Violators are large, well financed companies requiring more than just a slap on the wrist to alter anticompetitive behavior.[48/] The forfeiture amount must be sufficiently large to operate as a marketplace economic disincentive. The amount of $7,500 per day without a cap on the total amount of the fine should serve that purpose. If experience proves that even that forfeiture amount is insufficient to deter Section 628 violations, the Commission should expressly reserve the right to increase it. The forfeiture should be assessed immediately upon the determination of liability. Adoption of mandatory forfeitures will send an unequivocal signal to violators of the program access rules: the Commission will not tolerate such anticompetitive behavior.

However, the Commission should recognize the important distinction between forfeitures and damages. Each serves a significantly different purpose in creating the necessary disincentives to prevent violations. Forfeitures are economic sanctions against a violator that vindicate the integrity of the Commission's rules and processes. Forfeitures, a form of punishment, are paid to

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[48/] Repeated violations of Section 628 by one company underscore the importance of amending the program access rules to require mandatory forfeitures. *See Classic Sports Network, Inc. v. Cablevision Systems Corporation* in CSR-4975-P (filed Mar. 17, 1997) (referred for Administrative Hearing Aug. 5, 1997); *Bell Atlantic Video Services v. Rainbow Programming Holdings, Inc. and Cablevision Systems Corporation* in CSR-4983-P, *Memorandum Opinion and Order* in DA 97-1452 (rel. July 11, 1997); *Corporate Media Partners d/b/a Americast and Ameritech New Media, Inc. v. Rainbow Programming Holdings, Inc.*, in CSR-4873-P, *Memorandum Opinion and Order* in DA 97-2040 (rel. Sept. 23, 1997).

the U.S. Treasury -- not to injured parties. In contrast, damages are paid to the injured parties. The key distinction is that forfeitures strictly redress offenses to the governmental interest in protecting consumers and promoting competition, while damages uniquely redress the concomitant injuries to the complaining party which forfeitures alone would neglect.

While forfeitures are unquestionably necessary, alone they would be inadequate. The sole imposition of forfeitures, without liability for damages to the injured parties, might be insufficient to deter anticompetitive conduct violative of Section 628. Liability for forfeitures alone would permit violators to consider the aggregate forfeitures as a measure of total potential exposure for violations of the program access rules -- without regard to facing the consequences of economic injuries caused to would-be competitors. Bad actors might well decide that the risk of forfeitures alone would be worth the potential gains flowing from anticompetitive conduct. To safeguard against such a risk-reward analysis the Commission's rules should provide for the award of damages in addition to forfeitures for violation of the program access rules.

Damages for violations of the program access rules should be determined based on well established damages principles in antitrust cases. Generally, an antitrust plaintiff has been required to demonstrate: (1) that its profits have been reduced due to the defendant's antitrust violation; and (2) the extent of the loss. Courts have allowed plaintiffs to prove lost profits through combinations of theories, as long as the damages were adequately supported by the